Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

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ROBERT W. BENSON, et. al.,

Petitioners,

vs.

EMPIRE STATE BANK,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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Paul Engg
Attorney for Bensons
Attorney Registration No. 134685
1600 Foshay Tower
821 Marquette Avenue
Minneapolis, MN 55402-2919
(612) 335-3700

Of Counsel:
Lawrence Crosby

QUESTIONS PRESENTED FOR REVIEW

I: Whether the provisions of a confirmed Chapter 12 bankruptcy plan which reduce real estate indebtedness remain in effect when the case is converted to a Chapter 7 bankruptcy case and where the lender has in exchange for its agreement to the stipulation received significant cash and property?

II: Whether a Bank has met its burden of proof in response to a demand for an accounting when the Bank offers no records, no audits, and no expert witness-accountant to prove up the sums the Bank claims as due in a foreclosure by advertisement?

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11 U.S.C. [Section] 1227(a).

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Brack v. Brack, 16 N.W.2d 557 (Minn. 1944).

H.F. Shephersons Co. v. Central Fire Insurance Co., 19 N.W.2d 772, 777 (Minn. 1945).

Johnson v. Johnson, 137 N.W.2d 840 (Minn. 1965).

Rye v. Phillips, 203 Minn. 567, 282 N.W. 459 (1957).

Wilson v. Moline, 38 N.W.2d 201, 207 (Minn. 1949).

MINNESOTA LAW:

Minnesota Statutes, Section 480.10.

OPINIONS BELOW

This Petition seeks review of the Order of the Supreme Court of the State of Minnesota declining review, Robert W. Benson et al., v. Empire State Bank, C8-93-2045, and the reported underlying Minnesota Court of Appeals decision, Robert W. Benson et al v. Empire State Bank, (Minn. Ct. App. 1993). Each of these decisions has been reprinted in the Appendix.

STATEMENT OF JURISDICTION

Petitioners-Benson seek review of the decision of the Minnesota Court of Appeals, filed May 3, 1994, and the denial of review by the Supreme Court of the State of Minnesota, filed June 29, 1994. This Supreme Court of the United States has jurisdiction based on 28 U.S.C., Section 1257 and the United States Bankruptcy Code.

STATEMENT OF THE CASE

This case first came to the Minnesota Court of Appeals from Yellow Medicine District Court after a court-trial. The Court of Appeals held that the Chapter 12 bankruptcy write-down of the real estate note and mortgage did not survive conversion to a Chapter 7 liquidation case. The Court of Appeals also held that the defendant bank need not provide correspondence between its own records and any accounting to the Bensons. Benson et al. v. Empire State Bank, C8-93-2045.

The Minnesota Supreme Court did not grant the Petition for a Writ of Certiorari. This petition had the same caption and appellate case number.

STATEMENT OF FACTS

Robert and Charlette Benson farmed land in Yellow Medicine County.

Robert and Charlette Benson signed an undated note and a mortgage dated June 5, 1986, in the amount of $176,000 in favor of Empire State Bank. A separate chattel mortgage was also executed.

Robert and Charlette Benson first sought protection against their creditors under Chapter 12 of the United States Bankruptcy Code on June 6, 1988.

The United States Bankruptcy Court confirmed Bensons' Third Modified Plan of Reorganization on November 1, 1988.

Empire State Bank received significantly more than any other creditor under the Plan:

> Class VII. Empire State Bank. On the real estate note dated June 5, 1986, in the original principal amount of approximately $202,273.00 as of June 6, 1988, this Class will be paid $121,000.00 with 10% simple interest per annum, amortized over 30 years and ballooned in 7 years from the date of first payment with

interest accruing from December 1, 1988, with a payment of approximately $12,784.42 per year with $6,392.21 paid on or before April 15, 1989 and a like and equal $6,392.21 paid on or before December 15, 1989 and a like and equal $6,392.21 paid each April 15th and December 15th thereafter until April 15, 1996 when the full remaining balance of principal and interest shall be due and payable. This class shall also be paid with respect to this note, $7,500.00 by execution and turn over of M.C.P. stock at or about the time of the confirmation of this Plan. This class shall also be paid, with respect to this debt, $16,242.96 by way of a check for proceeds of 1987 soy bean sales and a check of $539.42 by way of check for proceeds of 1987 soy bean sales -- to be turned over at or about the date of the confirmation of this Plan. Debtors shall also release to Empire State Bank all stored grains belonging to the Debtors. This class shall also be paid, with respect to this debt, $12,000 comprising the remaining custom rent due Debtors from Fred Benson, Debtor[']s father, not later than November 31, 1988. This class shall also be paid, with respect to this debt, any and all federal crop insurance by

> way of a turn over to Empire State Bank of said amounts at the time they are received. This class to receive [additionally] a deed to Tract 1 at an agreed value of $22,500.

(Emphasis added.)

Empire State Bank received under the Plan, apart from the payments made by the trustee, consisted of grain payments, insurance proceeds, rent, a building site and stock, came to $61,869.34 and went only to reducing principal. The trustee made $19,176.63 in cash payments under the Plan.

Bensons then converted their Chapter 12 Plan to a Chapter 7 liquidation. The Bank did not object to the Court's discharging the Bensons, but the Bank requested relief from the automatic stay to foreclose on the Bensons' real estate loan and then foreclosed by advertisement. Bensons initiated a

lawsuit to enjoin the foreclosure and to demand an accounting. Minnesota law permits the voiding of a foreclosure if the amount bid is too low. The trial court declined to enjoin the foreclosure.

The Bank bid $164,321.00 at the Sheriff's sale, the amount claimed in the Notice of Mortgage Foreclosure Sale, The bankruptcy Judge did not permit the bank to enforce its chattel loan.

Empire State Bank and Bensons executed an AGREEMENT, STIPULATION AND ORDER, later ratified by the bankruptcy court. That Agreement reported the value of the Bensons' real property as $90,000; but the Bank or Bensons 'had the right in subsequent proceedings to contest this figure." The bank never contested this $90,000 valuation.

The bank did not have the necessary records to show the balance due on the

real estate note and had to "reconstruct" the note.

Bensons, their Certified Public Accountant and their two attorneys requested a accurate accounting relative to the real estate note. Empire Bank declined to certify any accounting as accurate until after the redemption period expired. Not until trial did the Bank extend an "accounting," one prepared by James Anderson, the Bank's attorney. As Mr. Anderson put so well, "[t]he bank doesn't pretend that each and every thing they've done on every entry throughout these files has been completely accurate. But for purposes of this litigation as to put a number before this Court today the bank is claiming that Exhibit 15 is accurate." A bank officer agreed at trial that the Bank's books were "internally inconsistent," An audit

confirmation from the bank's files made by Wolf, Etter, Certified Public Accountants, indicated a balance due on the Benson note as $146,794.06, as of October 28, 1991.

ARGUMENT

I: Whether the provisions of a confirmed Chapter 12 bankruptcy plan which reduce real estate indebtedness remain in effect when the case is converted to a Chapter 7 bankruptcy case and where the lender has in exchange for its agreement to the stipulation received significant cash and property?

This Supreme Court must determine whether the $121,000 value stated with respect to the Benson farmstead under the Chapter 12 Plan has continuing effect during the subsequent liquidation. This issue has not been determined by this Court.

Confirmation of a Chapter 12 Bankruptcy Plan binds both the debtors,

the Bensons, and their creditor, here Empire State Bank. 11 U.S.C., Bankruptcy Code, Section 1227(a).

A confirmed plan must have binding effect because of the need for finality in determining the rights and duties of the various parties. In re Winterfeldt, 28 B.R. 486, 488 (Bankr. E.D.Wis. 1983).

Confirmation of a Chapter 12 Plan is res judicata as to issues which might have and should have been raised before confirmation or in connection with confirmation itself. In re Evans 30 B.R. 530, 531 (9th Cir. 1983). See also In re Lewis, 64 B.R. 415, 417 (Bankr. E.D. Penn. 1986) as well as In re Lewis, 8 B.R. 132, 137 (Bankr. D. Idaho 1981). The active participation of Empire State Bank in formulating the Bensons' Chapter 12 Plan would make it especially unfair for the Bank to assert a position

inconsistent with the Plan. In re Lech, 80 B.R. 1001, 1007 (Bankr. D. Neb. 1987).

The effect of confirmation of a Chapter 12 plan functions much as a novation, with its four required elements: A previously valid obligation, the agreement of the parties to a new contract, the extinguishment of the previous contract, and that the new contract be legally valid. In the present case, the real estate note and mortgage were previously valid obligations; under the Chapter 12 plan, the relevant statutory provisions indicate that a new contract has taken the place of and extinguished the previous note and mortgage balance; finally, the Chapter 12 plan has been ratified by the United States Bankruptcy Court. As the Minnesota Supreme Court stated in Brack v. Brack, 16 N.W.2d 557,

560 (Minn. 1944), "no consideration is necessary to support an agreement by a creditor to accept less than the amount due on a liquidated past-due indebtedness in discharge of the whole, Rye v. Phillips, 203 Minn. 567, 282 N.W. 459, 119 A.L.R. 1120." A recent bankruptcy decision is equally instructive:

> Once a plan is confirmed, the preconfirmation debt is "replaced" with a new indebtedness as provided in the confirmed plan. The new indebtedness is in essence a new and binding contract between the Debtor and the creditors. Upon confirmation, the Debtor is free to conduct business and, as a consequence, is similarly liable for post-confirmation obligations and conduct.

In re Coleman, 104 B.R. 338, 344 (Bankr. D. Mont. 1989).

According to the provisions of Section 1230 of the Bankruptcy Code, the Chapter 12 Plan cannot be revoked at all, even for as serious a matter as fraud;

neither can the Plan be made subject to modifications once 180 days have passed since the date that the Plan has been confirmed. In re Gross, 121 B.R. 587, 592-93 (Bankr. D.S.D. 1990).

Empire State Bank did not object to confirmation of the Chapter 12 Plan or even contest the present value of its secured claim. But even if the Bank had, the Bank retained a lien on the present value of its secured collateral in the amount of $121,000. In re Robinson Ranch, Inc. 75 B.R. 606, 610-11 (Bankr. D. Mont. 1987). Any previous lien amount could no longer be enforced on its own terms.

The Bensons converted their Chapter 12 farm reorganization plan to a Chapter 7 liquidation plan. This conversion, in the complete absence of a directive to the contrary from the Bankruptcy Court,

retained the provisions of the Chapter 12 plan as to the real estate mortgage debt:

> The provision of Debtor's confirmed Plan now at issue was a negotiated post-petition agreement between Debtors and Bank, and is binding upon those parties. 11 U.S.C. [Section] 1227(a). Because the agreement was entered into subsequent to the effective date of Debtor's Chapter 7, conversion of the case from Chapter 12 to Chapter 7 does not render such agreement subject to attack in this bankruptcy. Thus, to the extent provisions of Debtor's plan were effectuated prior to conversion, such provisions remain binding upon the parties and can not be unilaterally annulled.

In re Gilbert, 147 B.R. 801, 802 (Bankr. W.D. Okla. 1992).

Empire State Bank obviated the provisions of the Chapter 12 Plan. The Minnesota trial court did not possess jurisdiction to modify the Plan.

In fact, the United States Bankruptcy Court for the District of Minnesota held in In re Errington, 39

B.R. 968, 971 (Bankr. D. Minn. 1984), that two debtors could not vacate or revoke a confirmed plan in order to get a better deal in Chapter 7: "Although it is now clear to the debtors that their case should not have been filed as a reorganization case...they also assume the risks and responsibilities of dealing with their creditors as they have agreed under the terms of the plan."

In re Davenport, 153 B.R. 551 (9th Cir. Bankruptcy Panel 1993), stands for the proposition that an agreement made in bankruptcy controls even over federal statutes to the contrary. In In re Davenport, a debtor forced his creditor to take back his Federal Land Bank stock in order to reduce his debt. In Benson, the Bank received real property, stock, and cash payments; Bensons got the indebtedness in their real estate note

reduced to $121,000. To allow Empire State Bank to have these payments and, not long after, to take all the real property cannot be countenanced.

The purpose of Chapter 12 of the Bankruptcy Code is to address the farm crisis: "Chapter 12 is emergency legislation intended to remedy a national crisis. ...Chapter 12 contains powerful remedies designed to give the debtor maximum flexibility in restructuring debts." In re Davenport at 555.

It is clear that the payments or transfers made by Bensons apart from the Trustee's cash payments, stand as a pay-down to reduce the indebtedness to $121,000. This amount is the starting point for the new real estate loan.

Should this Court determine that the $121,000 real estate value provision of the Chapter 12 plan has continuing

application between the parties to the real estate mortgage-transaction, it is obvious that Empire State Bank foreclosed on the Bensons' farm at an amount much higher than the amount owing.

Minnesota Statutes, Section 480.10, vests in Bensons the right to this $28,873.09 surplus, the difference between the foreclosure bid price and the actual amount due and owing.

> II: Whether a Bank has met its burden of proof in response to a demand for an accounting when the Bank offers no records, no audits, and no expert witness-accountant to prove up the sums the Bank claims as due in a foreclosure by advertisement?

One has the right to expect chicanery where a Bank does not submit an expert accounting or refer to its own business records for its own proof. See Johnson v. Johnson, 137 N.W.2d 840 (Minn. 1965). No accounting firm or in-house

accounting testified for Empire State Bank.

In H.F. Shephersons Co. v. Central Fire Insurance Co., 19 N.W.2d 772, 777 (Minn. 1945), the Minnesota Supreme Court held that evidence of accounts may be received where "it appears that the entries were made contemporaneously with the transactions by a duly authorized person and as a part of the general system of accounts in the ordinary course of business." The trial transcript makes it quite clear that the Bank's records were not in any sense contemporaneous with the transactions between the Bank and the Bensons. Worse, the documents and figures cannot even be reconciled by Gary Gabrielson, the Bank vice-president with responsibility for the loan. The trial court erred in accepting any last-minute "accounting"

from the Bank.

In a partnership case considering an accounting, Wilson v. Moline, 38 N.W.2d 201, 207 (Minn. 1949), the Minnesota Supreme Court stated in dicta that

> equity should shift the burden of proof onto defendant in the instant case if he is going to claim credit and profit from his negligent bookkeeping. This is especially so under the rule of the decision in the Woodacre case, 314 Mass. 70, 49 N.E.2d 247, supra, once Moline's haphazard and misleading accounting practices are established. Any other result would be absurd.

(Emphasis added.)

This same Moline case rebuffed the reception by the trial court of an accounting prepared by a person who did not personally testify at trial. Id. James Anderson, out-house counsel defending the bank and author of the sole accounting refused to testify at trial.

Robert and Charlette Benson offered

the testimony of an expert-witness certified public accountant to establish their figures. Bensons offered the only competent evidence as to the debt owed on the real estate note as of the date of the mortgage foreclosure.

CONCLUSION

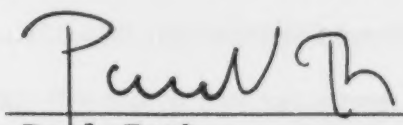
The Minnesota Court of Appeals decision should be reversed on these grounds: Empire State Bank did not ask the United States Bankruptcy Court to modify the terms of the confirmed Chapter 12 Plan. The $121,000 balance on the real estate loan became res judicata as to the debt between Empire State Bank and the Bensons. Further, the Bank's own records could not support their demand for $164,321 as the balance due on the mortgage.

The writ for certiorari should issue.

Dated at Minneapolis, Minnesota,

this 27th day of September, 1994.

PAUL ENGH, LAWYER



Paul Engh
Attorney for Bensons
Attorney Registration No.
134685
1600 Foshay Tower
821 Marquette Avenue
Minneapolis
Minnesota 55402-2919
(612) 335-3700

Of Counsel:

Lawrence H. Crosby
Attorney Registration No. 192788
CROSBY & ASSOCIATES
25 Empire Drive
St. Paul
Minnesota 55103-1800
(612) 298-9462

APPENDIX

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STATE OF MINNESOTA

IN SUPREME COURT

C8-93-2045

ROBERT W. BENSON, et al.,

Appellants,

vs.

EMPIRE STATE BANK,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Robert W. and Charlette Benson for further review be, and the same is, denied.

Dated: June 29, 1994

BY THE COURT:

Chief Justice

SIMONETT, J. took no part.

Robert W. BENSON, et al., Appellants,

v.

EMPIRE STATE BANK, Respondent.

No. C8-93-2045.

Court of Appeals of Minnesota.

May 3, 1994.

Syllabus by the Court

In a Chapter 12 bankruptcy, confirmation of the reorganization plan binds the parties to the terms of the plan, unless confirmation is revoked or the case is later dismissed or converted to another chapter. Where a debtor has failed to complete the terms of the Chapter 12 plan and has not received a discharge on a mortgage note, the creditor may restore its original lien amount notwithstanding the note's value under the Chapter 12 plan.

Considered and decided by AMUNDSON, Presiding Judge, FORSBERG, Judge, and CRIPPEN, Judge.

OPINION

AMUNDSON, Judge

Appellants Robert and Charlette Benson argue that the district court erred

by (1) allowing the bank to reinstate the original mortgage amount after they defaulted on the Chapter 12 bankruptcy plan;

(2) finding that the mortgagee had provided a sufficient accounting of payments made by the debtor under the Chapter 12 bankruptcy plan; and (3) permitting attorney fees beyond those allowed under Minnesota foreclosure law. We affirm.

FACTS

The Bensons farmed in rural Yellow Medicine County for "virtually all of their adult lives." In June 1986, the Bensons executed a promissory note and real estate mortgage to Empire State Bank (bank) in the amount of $176,000. Due to tremendous market pressure and a decrease in the value of their real estate, the Bensons voluntarily filed a Chapter 12 bankruptcy petition in June 1988.

The bankruptcy court ultimately confirmed the Bensons' third modified plan of reorganization. The plan treated the bank's claim as follows:

On the real estate note dated June 5, 1986 in the original principal amount of approximately $202,273.00 (sic) as of June 6, 1988, this Class will be paid $121,000.00 with 10% simple interest per annum, amortized over 30 years

and ballooned in 7 years from the date of first payment with interest accruing from December 1, 1988, with a payment of approximately $12,784.42 per year * * *. This class shall also be paid with respect to this note, $7,500.00 by execution and turn over of M.C.P. stock at or about the time of the confirmation of this Plan. This class shall also be paid, with respect to this debt, $16,242.96 by way of a check for proceeds of 1987 soy bean sales and a check of $539.42 by way of a check for proceeds of 1987 soy bean sales–to be turned over at or about the date of the confirmation of this Plan. Debtors shall also release to Empire State Bank all stored grains belonging to Debtors. This class shall also be paid, with respect to this debt, $12,000.00 comprising the remaining custom rent due Debtors from Fred Benson, Debtors' father, not later than November 31, 1988(sic). This class shall also be paid, with respect to this debt, any and all federal crop insurance by way of a turn over to the Empire State Bank of said amounts at the time they are received.

The Bensons continued their farming operation under the Chapter 12 plan, but the record indicates that they missed two payments (one in April 1990 and one in April 1991). Unable to continue making the plan payments,

the Bensons converted their Chapter 12 bankruptcy to Chapter 7. Several weeks later, the bankruptcy court granted the bank relief from the automatic stay to enforce its security interest against the Bensons' real property.

In August 1991, the Bensons' debt was discharged under Chapter 7. The bank initiated foreclosure by advertisement proceedings in September 1991. The bank claimed that, because the Bensons defaulted on the terms of the Chapter 12 plan, the bank was not obligated to the terms of the plan. The bank "reconstructed" the real estate note, by returning to the original loan amount of $176,000. After crediting payments made by the Bensons and the Chapter 12 trustee and recomputing interest on the note, (FN1) the bank declared an amount due and owing on the property of $164,321. The bank then "purchased" the property for this amount at the sheriff's sale on October 23, 1991.

Just before the foreclosure sale, the Bensons commenced an action against the bank to enjoin the sale of their farmland or, alternatively, to find the sale null and void. The Bensons also requested a complete accounting from the bank with respect to payments made on their mortgage note from 1986 through 1991.

When the matter finally came to trial, three issues were before the court. First, the parties stipulated to expand the scope of relief before the court; specifically, they agreed to address whether any surplus arose from the bank's foreclosure sale and, if so, whether the Bensons were entitled to that surplus under Minn.Stat. Sec. 580.10 (1990). Second, the Bensons argued that the bank still had not provided an accurate financial accounting, and third, the Bensons contended that the bank violated Minn.Stat. Sec. 582.01 (1990) by claiming unauthorized attorney fees.

The district court found that no surplus existed from the foreclosure sale, that the bank had presented a "full accounting," and that the bank owed nothing more to the Bensons. The Bensons appeal from the court's final judgment and from the order denying a new trial and/or amended findings.

ISSUES

I. Does confirmation of a Chapter 12 bankruptcy plan bind the debtors and creditors to the terms of the plan even after the debtors convert to a Chapter 7?

II. Did the district court err in finding that the bank had provided a "full accounting" where the bank offered no contemporaneous records, no expert witness, and no formal audit?

III. Did the bank claim attorney fees beyond those allowed by Minnesota foreclosure law?

ANALYSIS I.

A. Standard of Review (Application of the Bankruptcy Code)

Whether a Chapter 12 bankruptcy plan has a permanent, binding effect on the debtor and creditors presents a question of law. "On appeal, this court need not defer to the trial court's conclusion when reviewing questions of law." County of Lake v. Courtney, 451 N.W.2d 338, 340 (Minn.App.1990), pet. for rev. denied (Minn. Apr. 13, 1990).

B. Jurisdiction

Resolution of the first issue requires this court to interpret and to apply federal bankruptcy law. Bankruptcy courts have jurisdiction over any or all cases under title 11 and any or all core proceedings arising under title 11 or arising in or related to a case under title 11.

In re Gallucci, 931 F.2d 738, 741 (11th Cir.1991) (quoting 28 U.S.C. Sec. 157(a) (1988)). Bankruptcy courts, however, "may not entertain cases involving noncore, unrelated matters." Id.

Whether the bank provided an adequate accounting to the Bensons,

whether any surplus existed from the foreclosure sale, and whether the bank improperly computed attorney fees are issues involving Minnesota law and are thus noncore matters, unrelated to the bankruptcy proceeding. See In re Howe, 913 F.2d 1138, 1142 (5th Cir.1990) ([A][federal] district court must abstain from hearing a non-core, related matter if the action can be timely adjudicated in state court."); see also Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 918 (1979) "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.").

The Bensons' appeal involves their property interest vis a vis Minnesota foreclosure law. See Minn.Stat. Secs. 580.01-.30 (1990). A review of applicable bankruptcy provisions does not demonstrate any countervailing federal interest requiring this case to be decided by the federal courts. Thus, the issues involved in this appeal are within this court's purview.

C. Applicable Bankruptcy Law

1. Effect of Confirmation of Bensons' Chapter 12 Plan

The Bensons rely on section 1227 of the bankruptcy code for support

that, upon confirmation by the bankruptcy court of the Chapter 12 plan, the bank was bound to the terms of the plan. Section 1227 provides:

> (a) [T]he provisions of a confirmed plan bind the debtor, each creditor, each equity security holder, and each general partner in the debtor, * * * whether or not such creditor * * * has objected to, has accepted, or has rejected the plan.
>
> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

11 U.S.C. Sec. 1227 (1988). Confirmation of a Chapter 12 plan binds the debtor and the creditor and imposes a stay of action against codebtors. This protection applies only as long as the debtor makes payments according to the plan or until the plan is closed, dismissed, or converted to a case under Chapter 7 of this title. See 11 U.S.C. Secs. 1201(a)(2), 1228(a) (1988); First Federal Sav. & Loan Assoc. v. Hysten, 846 P.2d 261, 263 (Kan. Ct.App.1993) ("The res judicata effect of confirmation may be eliminated only if confirmation is revoked or if the case is later dismissed or converted to another chapter.").

2. Discharge of the Debt Under Chapter 12

A discharge in bankruptcy does not extinguish the debt itself but merely releases the debtor from personal liability. * * * The debt still exist, however, and can be collected from any other entity that might be liable.

In re Lembke, 93 B.R. 701, 702 (Bankr.D.N.D.1988). Unlike Chapter 11 reorganization, (FN2) a Chapter 12 discharge is contingent upon the debtor's performance of the plan. The Code provides:

As soon as practicable after completion by the debtor of all payments under the plan, * * * the court shall grant the debtor a discharge of all debts provided for by the plan.

11 U.S.C. Sec. 1228(a) (1988). The binding effect of confirmation in Chapter 12 continues only as long as the debtor makes payments under the plan. Once the plan is converted to Chapter 7, however, the unconsummated Chapter 12 plan no longer binds the debtors.

In re Muzzey, 134 B.R. 800, 807 (Bankr.D. Vt.1991). Rather the effect of the plan is subject to defeasance if the debtor fails to obtain a discharge. If discharge is denied, claims against the debtor will be discharged only to the extent of payments actually received by the creditor.

5 Collier on Bankruptcy 1227-3 (Lawrence P. King ed., 15th ed.1993).

The Bensons argue that the bank should not have "reconstructed" the real estate note, using the $176,000 original mortgage amount. Rather, the Bensons want the starting balance to be the $121,000 figure as set forth in the Chapter 12 plan.

The Bensons' argument fails for two reasons: first, confirmation of the Chapter 12 plan bound the bank to accepting the amount of $121,000 only as long as the Bensons complied with the Chapter 12 plan. Second, the Bensons' debt to the bank was not discharged. When payments under a [Chapter 12] plan are not completed, and the unsecured debt is not discharged, a secured creditor may foreclose on its original collateral to the extent of the entire debt secured by the mortgage, not just the secured portion.

In re Rott, 73 B.R. 366, 374 (Bankr.D.N.D.1987); See Farm Credit Bank v. Maberry, 498 N.W.2d 210, 212 (S.D.1993).

The Bensons also contend that the Chapter 12 plan functioned like a novation. This theory fails too because a novation requires that a new contract take the place of and extinguish the previous note and mortgage balance. See Black's Law Dictionary 959 (5th ed.1979).

Because the Bensons' debt was not discharged under the Chapter 12 plan, the debt was not "extinguished." The Bensons rely on In re Coleman, 104 B.R. 338, 344 (Bankr.D. Mont.1989), to support the notion that the "preconfirmation debt is 'replaced' with a new indebtedness as provided in the confirmed plan." While the Coleman court correctly paraphrased the applicable bankruptcy provision, this holding is not applicable to the Bensons because the Coleman facts did not involve a debtor who had defaulted from a reorganization plan or a debtor who converted from one bankruptcy chapter to another.

In sum, the bankruptcy code does not bind creditors to the terms of a Chapter 12 reorganization plan after the debtor has defaulted and converted to Chapter 7. The bank was entitled to retain its "original" lien amount on the property. See Maberry, 498 N.W.2d at 212 (section 1225(a)(5)(B)(i) requires that the original lien be retained, not a lien).

A district court's "findings of fact will be reversed only if, upon review of the entire evidence, a reviewing court is left with the definite and firm conviction that a mistake has been made. Gjovik v. Strope, 401 N.W.2d 664, 667 (Minn.1987).

A district court's findings of fact "shall not be set aside unless clearly erroneous." Minn R. Civ. P. 52.01. Clearly erroneous means "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Northern States Power Co. v. Lyon Food Prods., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). In actions on accounts, "the burden is upon [the appellant] to show that there was no substantial evidence reasonably tending to sustain the trial court's findings as to the amount due." H.F. Shepherdson Co. v. Central Fire Ins., 220 Minn. 401, 409, 19 N.W.2d 772, 776 (1945).

Neither party disputed that the bank's records reflected all payments made by the Bensons and the Chapter 12 trustee. Except to argue that the starting balance should have been $121,000 and that an expert witness should have verified the bank's figures, the Bensons did not challenge the mechanical calculation of principal and interest payments. At oral argument, the Bensons' attorney conceded that, assuming a starting balance of $176,000, the bank's calculations were within "a couple hundred dollars" of being correct.

On review of the record, we conclude that the district court's findings were reasonably supported by the evidence as a whole.

III.

The final issue is whether the bank claimed attorney fees beyond those allowed by Minnesota foreclosure law. Under Minnesota law:

> The mortgagor may, in the mortgage, covenant to pay or authorize the mortgagee to retain an attorney's fee in case of foreclosure; but such fees in case of foreclosure by advertisement shall not exceed the following amounts, and any provision for fees in excess thereof shall be void to the extent of the excess.
>
> Minn.Stat. Sec. 582.01 (1990).

Here, the disputed fees did not accrue as a result of the foreclosure, and the amounts recoverable are not limited by the statute. Rather the fees at issue were incurred while defending the bank's position during the bankruptcy proceedings from December 1988 through July 1991. Because the Bensons' real estate note provides for payment of attorney fees related to collection of the note, the bank was entitled to these fees.

DECISION

Confirmation of a Chapter 12 bankruptcy plan does not bind the parties to the terms of the plan where the debtors have not received a discharge but

converted to Chapter 7. Thus, the bank was entitled to restore the original mortgage amount.

Affirmed.

FN1. The sum of payments received by the bank under the Chapter 12 plan through the Chapter 12 Trustee amounted to over $61,000. The 10% interest rate on the original note was the same as the interest rate under the Chapter 12 plan.

FN2. Under Chapter 11, confirmation of a chapter 11 plan results in a discharge of the debtor from prepetition unsecured debts. See 11 U.S.C. Sec. 1141 (1988). Under Chapter 12, the debt is discharged only after the debtor has completed the plan. See 11 U.S.C. Sec. 1228(a).

STATE OF MINNESOTA

COUNTY OF YELLOW MEDICINE

DISTRICT COURT
EIGHTH JUDICIAL DISTRICT
FILE NO. C6-91-331

Robert W. Benson and Charlette Benson, Husband and Wife,

Plaintiffs,

vs.

Empire State Bank,

Defendant.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER FOR JUDGMENT

This matter came before the Court on February 25, 1993 for Trial with respect to issues involving the proceeds of a mortgage foreclosure sale and related issues. Attorney Lawrence H. Crosby represents Plaintiffs; and Attorney

James R. Anderson represents Defendant. Written argument and material was submitted subsequent to trial, with the final submission being a letter from Plaintiff's counsel, received by the Yellow Medicine County Court Administrator on April 5, 1993. Upon careful consideration of the evidence received the Court makes the following:

FINDINGS OF FACT

1. On June 5, 1986, and for some time prior to and subsequent to that date Plaintiffs farmed in rural Yellow Medicine County and resided on the land which they farmed. This land is legally described as:

The East Half of Southeast Quarter (E1/2 of SE1/4,) of Section Twenty-Eight (28); and West Half of Southwest Quarter (W1/2 of SW1/4) of Section Twenty-Seven (27) all in Township One Hundred Fourteen (114)- North, Range Forty-One (41) West of the Fifth Principal Meridian, and containing 160 acres, more or less, according to the U.S. Gov't Survey thereof.

and,

The South 523 feet of the East 500 feet of the Southeast Quarter of the Southeast Quarter (SE1/4 SE1/4) of Section Thirty-Five (35), Township One Hundred Fourteen (114), North, Range Forty-One (41) West of the Fifth (5th) Principal Meridian.

2. On or about June 5, 1986 Plaintiffs borrowed money from Defendant and, in exchange therefor, executed a Promissory Note to Defendant, and a Real Estate Mortgage securing that Promissory Note. The mortgage gave to Defendant a Lien upon the property described therein (Paragraph 1, above). (Exhibits 1 and 2). The face amount of the note was $176,000.00.

3. Subsequent to execution of the note and mortgage Plaintiffs became in default with respect to repayment. Defendant foreclosed on the mortgage by advertisement, and the foreclosure sale was held on October 23, 1991. Defendant obtained title to the foreclosed real estate by a bid at the foreclosure sale in the amount of $164,559.87.

4. In addition to Defendant's bid at the foreclosure sale, Defendant incurred $1,868.35 in costs and disbursements in connection with the foreclosure proceeding.

5. Plaintiffs made the following payments on the loan, with the resulting balances as shown:

Beginning Balance	TOTAL PAYMENT	INTEREST ACCRUED	
2-2-87	8,800.00	11,427.95	
12-21-87	664.72	150,611.59	
11-10-88	16,784.34	15,595.61	
11-16-88	3,085.00	293.34	
12-5-88	12,000-00	928.91	
12-29-88	22,500.00	1,173.36	
1-13-89	5,000.00	611.38	
4-27-89	6,392.21	4,414.80	
12-22-89	6,392.21	10,014.10	
11-13-90	6,392.21	13,659.40	
10-23-91		14,413.60	176,133.35

6. Interest computations in Paragraph 5 were made on a daily basis, except that: the computation of interest from December 21, 1987 to November 10, 1988 was computed for 10 months and 19 days, with monthly interest at $1,466.67 and daily interest at $48.89; and Defendant's computation prior to 12-21-87 was used, since it was within a few dollars of the Court's computation.

7. On November 1, 1988 Plaintiffs stipulated that the approximate balance unpaid and owed to Defendant on this

loan was $202,273.00. Because of an apparent error in drafting the "third modified plan of reorganization" (Exhibit 3) there is some ambiguity as to the applicable date of this balance. Article VII appears to indicate that the effective date of this balance was June,6, 1988; although it appears that a line or phrase is omitted from that sentence which should have referred to the original amount of $176,000..00. In Article IV, Class 3, of the same third modified plan of reorganization (near the bottom of page four of Exhibit 3) the reference is made to a "present" approximate balance of $202,273.00. The Court's computation of the balances on June 5, 1988 and November 1, 1988 result in balances of amounts in excess of $203,000.00 for June 5, 1988 and in excess of $208,000.00 for November 11, 1988.

8. On November 1, 1988 Plaintiffs executed a proposed "third modified plan of reorganization" under Chapter 12 of the Bankruptcy Act. Although the plan was

accepted by the Bankruptcy Court and by the creditors, Plaintiffs, shortly thereafter, defaulted with respect to this plan. The final sentence of the plan indicates that Plaintiffs' objective was to enable the creditors to receive maximum results from the plan, as well as Plaintiffs. In Article XI, page 10, of this plan Plaintiffs indicated their intent that creditors would receive more under the Chapter 12 plan than under a Chapter 7 bankruptcy proceeding.

9. Subsequent to Plaintiffs' default with respect to the third modified plan of reorganization, on May 28, 1991 Plaintiffs filed a petition dated May 15, 1991 converting their proceedings to Chapter 7 of the Bankruptcy Act.

10. The Agreement, Stipulation and order of the Bankruptcy Court dated July 19, 1991, Exhibit 9, paragraph 4 specifies that the debt owing to Defendant prior to commencement of the Chapter VII "is not discharged-as fully repaid under the Chapter XII plan". ii. The events involved in this matter with respect to the Chapter XII

bankruptcy proceedings did not operate to limit, reduce, or invalidate Defendant's original claim based upon the Promissory Note herein (Exhibit 1). Since Plaintiffs defaulted with respect to the Chapter XII agreement, Defendant was not bound thereby.

12. Defendant has provided to Plaintiffs a full accounting with respect to Plaintiffs' indebtedness under the Promissory Note herein (Exhibit 1); and has also fully accounted for the proceeds of the mortgage foreclosure sale arising out of Defendant's Lien established by the real estate mortgage (Exhibit 2).

13. Defendant does not owe any amount to Plaintiffs as a result of the mortgage foreclosure proceedings herein. There is no surplus within the meaning of M.S. 580.10.

14. During the trial the parties, through counsel, entered into a Stipulation with respect to the nature and relief to be encompassed in this proceeding. Pursuant to this Stipulation:

a) Plaintiff was permitted to expand its submission in this case to include the issue of whether any surplus exists arising out of the mortgage foreclosure sale which took place on August 23, 1991; and, if any surplus exists, whether Plaintiffs are entitled to that surplus,

b) The parties agreed that Defendant will follow the requirements of State of Minnesota Law with.respect to a right of first refusal relating to the 160 acre tract involved in this matter, and

c) Plaintiffs released and dismissed with prejudice any and all claims they may have against Defendant which arose prior to February 26, 1993, including any claims which Plaintiffs might assert to the approximately six acre building site described in Exhibit 2 herein as the South 523 feet of the East 500 feet of the Southeast Quarter (SE'-4) of the Southeast Quarter (SE-4) of Section 35, Township 114, Range 41, Yellow Medicine County, Minnesota.

In consideration of all of the terms of this Stipulation, the trial proceeded to a conclusion with respect to all issues, as expanded by this agreement.

CONCLUSIONS OF LAW

1. Plaintiffs were entitled to an accounting by Defendant with respect to the proceeds of the mortgage foreclosure sale and with respect to Plaintiffs' indebtedness to Defendant arising out of the Promissory Note No. 18093 and payments thereunder. Defendant has made a sufficient and adequate accounting in this regard, and no further accounting is necessary.

2. There exists no surplus within the meaning of Minnesota Statute Section 580.10 by which Plaintiffs might be entitled to any payment arising out of the mortgage foreclosure action or the Promissory Note or Mortgage involved herein.

3. Defendant owes nothing to Plaintiffs arising out of this matter.

4. Any and all claims or causes of action which Plaintiffs might assert against Defendant which occurred on or prior to February 26, 1993 shall be dismissed with prejudice, including any right or claim of title or interest that Plaintiffs may assert in that approximately 6.0 acre tract of land described as: the South 523 feet of the East 500 feet of the Southeast Quarter (SE1/4) of the Southeast Quarter (SE1/4) of Section 35, Township 114, Range 41, Yellow Medicine County, Minnesota.

5. Defendant is entitled to costs and disbursements herein.

ORDER FOR JUDGMENT

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: June 2, 1993.

/s/ Marquis L. Ward

(SEAL) MARQUIS L. WARD

Judge of District Court

STATE OF MINNESOTA

COUNTY OF YELLOW MEDICINE

DISTRICT COURT
EIGHTH JUDICIAL DISTRICT
FILE NO. C6-91-331

Robert W. Benson and Charlette Benson, Husband and Wife,

Plaintiffs,

vs.

Empire State Bank,

Defendant.

ORDER

This matter is before the Court to consider Motions by Plaintiffs for Amended Findings of Fact and Conclusions of Law, or for a new trial. Attorney Lawrence H. Crosby represents Plaintiffs; and Attorney James R. Anderson represents Defendant.

Issues relating to these Motions were argued by counsel on July 29, 1993. Upon careful consideration of the Motions and related documents, the arguments of counsel, and the Court's files and records herein,

IT IS HEREBY ORDERED That Plaintiffs' Motions shall be, and hereby are, denied.

DATED: August 26, 1993.

(SEAL)

MARQUIS L. WARD
Judge of District court

MEMORANDUM

The court in satisfied that the Findings of Fact and Conclusions of Law originally issued on June 2, 1993 are supported by and correctly reflect the evidence which was received at trial and the law which applies to this case. **Therefore, the Judgment which was entered based upon the Findings and conclusions should continue in force and effect.**

M.L.W.